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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re A.R. et al., Persons Coming Under the  
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

T.R.,

Defendant and Appellant.

E058363

(Super.Ct.No. RIJ1201241)

**OPINION**

In re A.R., a Person Coming Under the  
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

T.R.,

Defendant and Appellant.

E058723

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni, Judge, and Tamara Wagner, Temporary Judge (pursuant to Cal. Const., art. VI, § 21).<sup>1</sup> Reversed and remanded with directions.

Law Office of Richard L. Knight and Richard L. Knight, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, Julie Koons Jarvi and Carol Perez, Deputy County Counsels, for Plaintiff and Respondent.

T.R. (mother) has five daughters, ranging in age from 1 to 13. As of December 2012, when she was living with the father of two of the children, he choked, slapped, and/or pushed her while he was drunk. This was the first time that he had committed any act of domestic violence, though she had been the victim of an act of domestic violence by another man in 2005.

The next day, when a social worker contacted her, the mother agreed that she and the children needed to leave the home, but she dithered about exactly where they should go. As a result, the Department of Public Social Services (Department) detained the four older children (the youngest child was born shortly afterward) and filed this dependency. The juvenile court found that it had jurisdiction over the four older children based on

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<sup>1</sup> Judge Perantoni issued the jurisdictional/dispositional orders regarding the appellant's four older children. Judge Wagner issued the jurisdictional/dispositional orders regarding the appellant's youngest child.

failure to protect and jurisdiction over the youngest child based on (among other things) abuse of a sibling.

The mother appeals. We will hold that there was insufficient evidence that the children were at risk of serious physical harm due to the mother's failure to protect them from either domestic violence or alcohol abuse. She had no reason to anticipate the isolated act of domestic violence that triggered the dependency, and for all her dithering, she was in the process of moving out when the children were detained. Although she had been the victim of another act of domestic violence seven years earlier, there was no evidence that she had failed to protect the children then, either, or that she was particularly prone to abusive relationships. Accordingly, we will reverse the jurisdictional and dispositional orders.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

The mother grew up in Lompoc. She dropped out of college when she became pregnant with her first daughter, Al., who was born in 2000. The father of Al. was A.V. (V. father).

In 2004, the mother moved in with N.W. (Wi. father); in 2005, she gave birth to his daughter, Ak. Shortly after that, he became "abusive and very controlling." In late 2005, the mother reported the abuse to the authorities, and the Wi. father was arrested. At least according to him, he completed a court-ordered domestic violence program. The

mother went to a battered women's shelter, but she left "because they did not help her with anything . . . ." She went to stay with a friend instead.

In 2005 or 2006, the mother met A.P. (P. father). She had two daughters by him — Ad., in 2007, and Ay., in 2009. They had a "long distance relationship"; he lived in Southern California but visited her frequently in Lompoc.

In 2009, the mother moved to Southern California, where she soon started living with the P. father. However, she discovered that he was married to another woman. Thereafter, they were no longer a couple. In lieu of child support, he let her and the children live with him, but they led "separate lives." When the P. father was not at work, he rarely came out of his bedroom. According to the mother, he "spent most of his days in the home locked in his bedroom drinking alcohol." According to him, he drank a pint of brandy, plus beer, on weekends. In 2010 or 2012, he had been convicted of driving under the influence.

In April 2012, the mother began having seizures. As a result, she lost her job. Her seizures were brought under control by medication.

On December 3, 2012, the mother woke the P. father up to ask him if he had purchased Play-Doh, which the children needed for school, as he had agreed to do. He grabbed her by the neck. When she tried to push him away, he pushed her back, knocking her down. She landed on her stomach. Al. witnessed the incident.<sup>2</sup> However,

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<sup>2</sup> According to Al., the P. father "slap[p]ed her mother on the face and then pick[ed] her mother up by her neck and lift[ed] her off the floor."

Al. later told a social worker that “this was the first time something like this had happened . . . .”

At the time, the mother was 36 weeks pregnant by another man, G.W. (We. father). By evening, she was experiencing pain in her back. Due to her seizures, her driver’s license had been suspended. Accordingly, she walked to the hospital, which was two miles away. She left the children with the P. father’s brother, who agreed to look after them while she was at the hospital. Once there, she was found to have a tear in her uterus and to be having premature contractions. She was treated and released.

On December 4, a social worker and a sheriff’s deputy responded to the home. The mother told the social worker, “I knew I shouldn’t have knocked on his door, he doesn’t like being bothered after he’s been drinking.”

The P. father was arrested. When the mother saw him in handcuffs, she started crying; she said “[he] took care of her and her children and . . . she didn’t want him going to jail.”

The social worker told the mother it was not safe for her and the children to stay in the home, because the P. father could be released from jail at any time. She offered to arrange for the mother to go to a shelter. At first, the mother was “interested”; she said “she wanted to do whatever she needed to do [to] get out of her current situation.” Soon, however, she decided that she would rather stay with her own father in Lompoc than go to a shelter. Her father agreed to take her in. Then she changed her mind again; she said she wanted to stay in Moreno Valley “because she did not want her children changing

schools.” The social worker told her “no other options [a]re available at this point except for the children being placed outside of the home.” The mother “escalated” and became “more emotional,” so the social worker detained the children.

The Department filed a juvenile dependency petition. Initially, all four children were placed with M.R., who was the mother of the P. father (i.e., the paternal grandmother of Ad. and Ay.). At the detention hearing, however, the juvenile court placed Al. with her father, who lived in Lompoc, and it placed Ak. with her father, who lived in San Antonio, Texas. Ad. and Ay. remained with their paternal grandmother. At the mother’s request, the juvenile court also issued a domestic violence restraining order against the P. father.

The P. father admitted that, at the time of the domestic violence incident, he had been drinking. Immediately afterward, however, he stopped drinking and started going to Alcoholics Anonymous.

In January 2013, at the jurisdictional/dispositional hearing, the juvenile court found jurisdiction based on failure to protect. (Welf. & Inst. Code, § 300, subd. (b).) It formally removed custody of Al. and Ak. from the mother, granted sole physical custody of them to their fathers, and ordered that the dependency be terminated as to them once family law orders were filed. It also formally removed custody of Ad. and Ay. from the mother and ordered that they remain placed with their paternal grandmother.

In February 2013, the mother gave birth to another daughter, At. The Department immediately detained At. and filed a dependency petition as to her.

At.'s father had a prolific criminal history.<sup>3</sup> When the petition was filed, he was in jail on drug-related charges. The mother had broken up with him before At. was born; they had only "sporadic contact." However, the mother had arranged to move in with his mother (i.e., At.'s paternal grandmother).

At the detention hearing, At. was returned to the mother, on condition that they live with At.'s paternal grandmother. After a couple of weeks, however, At.'s paternal grandmother told the social worker that having the mother in her home "is not working," and she was going to tell the mother to move out.

In March 2013, the juvenile court authorized the mother to move to a different location, to be approved by the Department. With the social worker's approval, she went to live with her father in Lompoc. In April 2013, again with the social worker's approval, she moved into an apartment in Riverside provided through a transitional housing program.

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<sup>3</sup> Specifically, he had been convicted as follows:

June 2007: Possession of an unlawful weapon (Pen. Code, former § 12020, subd. (a)(1)); acquiring personal identifying information of 10 or more people with the intent to defraud (Pen. Code, § 530.5, subd. (c)(3)); and attempted burglary (Pen. Code, §§ 459, 664).

October 2007: Possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

February 2009: Receiving stolen property (Pen. Code, § 496, subd. (a)); and unlawfully using personal identifying information of another person (Pen. Code, § 530.5, subd. (a)).

In May 2013, at the jurisdictional/dispositional hearing regarding At., the juvenile court found that it had jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)), as to At.'s father only; failure to support (Welf. & Inst. Code, § 300, subd. (g)), again, as to At.'s father only; and abuse of a sibling (Welf. & Inst. Code, § 300, subd. (j)). It left At. in the mother's custody, but it ordered the mother to participate in family maintenance services.

## II

### THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT JURISDICTION

The mother contends that there was insufficient evidence to support jurisdiction over the children.

#### A. *Jurisdiction over the Four Older Girls.*

With regard to the four older girls (Al., Ak., Ad., and Ay.), the juvenile court sustained allegations that the mother had failed to protect the children, in that:

1. "The mother has a history of engaging in domestic violence disputes and on or about December 3, 2012, the [P.] father . . . slapped[] and grabbed the mother by the neck in the presence of the children, resulting in the [P.] father being arrested and charged with inflicting corporal punishment on a spouse."
2. "The mother knew or reasonably should have known that the [P.] father . . . abuses alcohol in the home, which places the children at risk of harm."
3. "The [P.] father . . . abuses alcohol in the home and has a prior arrest and/or conviction for driving under the influence."



Under Welfare and Institutions Code section 300, subdivision (b), the juvenile court has jurisdiction based on failure to protect when: “*The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child’s parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness, developmental disability, or substance abuse . . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.*” (Italics added.)

“[S]ection 300 does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction. The subdivisions at issue here require only a ‘substantial risk’ that the child will be abused or neglected. The legislatively declared purpose of these provisions ‘is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children *who are at risk of that harm.*’ [Citation.] ‘The court need not wait until

a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child.’ [Citation.]” (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

““In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. “In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations; and we note that issues of fact and credibility are the province of the trial court.” [Citation.]

“We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court.

[Citations.] “[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].”

[Citation.]” [Citation.]’ [Citation.]” (*In re I.J.*, *supra*, 56 Cal.4th at p. 773.)

1. *Jurisdiction based on domestic violence.*

The first allegation involved domestic violence. “Exposing children to recurring domestic violence may be sufficient to establish jurisdiction under section 300, subdivision (b). [Citations.]” (*In re T.V.* (2013) 217 Cal.App.4th 126, 134.)

““[D]omestic violence in the same household where children are living . . . is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.’ [Citation.] Children can be ‘put in a position of

physical danger from [spousal] violence’ because, ‘for example, they could wander into the room where it was occurring and be accidentally hit by a thrown object, by a fist, arm, foot or leg . . . .’ [Citation.]” (*In re E.B.* (2010) 184 Cal.App.4th 568, 576.)

Here, in December 2012, the P. father physically assaulted the mother. At the moment when the children were detained, it was reasonable for the social worker to be concerned about the mother’s ability to protect the children from domestic violence. Although the P. father had been arrested, he was likely to be out on bail at any moment. The mother indicated that she was dependent on him and she did not want him going to jail. Even though the social worker urged her to leave the home and offered to arrange for her to go to a shelter, she was indecisive; she wanted to stay in Moreno Valley, so the children would not have to change schools, but she did not identify any place in Moreno Valley where they could live (other than the P. father’s home).

However, “‘the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm’ . . . “[T]here must be some reason to believe the [abusive] acts may continue in the future.”” [Citation.]” (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) By the date of the jurisdictional hearing, any apparent risk had dissipated. The mother testified that, when the children were detained, she was in the process of moving out of the P. father’s home; she had no intention of staying there another night. She had obtained the funds to take the children to a hotel. Then, she was going to figure out where they could stay on a more permanent basis. She planned to live either with friends in the area or with her father in Lompoc.

Even after the children were detained, the mother did actually move out of the P. father's home immediately. She had made arrangements for her and the children to live with her then-unborn child's paternal grandmother. Her "backup plan" was to live with her father.

In any event, the domestic violence was a "one-time incident." The P. father had never been aggressive or violent before. After the incident, he stopped drinking and started going to Alcoholics Anonymous.

In sum, then, the mother did not fail to protect the children before the incident, because she had no reason to anticipate domestic violence, and because she was the victim of the domestic violence. She did not fail to protect them after the incident, because it was not likely to be repeated, and because she did protect them, by making arrangements to leave.

The Department points out that the mother "left the children in the home of the perpetrator when she walked to the hospital for treatment." This ignores the fact that the brother of the P. father was there and agreed to look after the children. Moreover, the P. father normally stayed in his room with the door locked. In fact, the incident started only because the mother woke him up. There was no reason to think the children were at risk during this brief period.

The Department also argues that the mother had a "history" of domestic violence with the Wi. father. However, while the mother described the Wi. father as "abusive"

and “controlling,” there was evidence of only one “domestic violence incident” involving him, which had resulted in him being arrested and her going to a shelter.

The social worker was very critical of the fact that the mother left the shelter and thus supposedly failed to take advantage of any services. The mother explained, however, that one reason why she left was that the shelter did not provide her with any services. Moreover, while she did leave the shelter, she went to live with a friend; she did not go back to the Wi. father.

Thus, this one prior incident, even when combined with the current incident in December 2012, was not evidence that the mother would fail to protect the children. There was no evidence that she sought out batterers or relationships featuring domestic violence. For all the record shows, she simply had the bad luck of being the victim of domestic violence twice in her life, in two separate relationships, approximately seven years apart. Both times, she took appropriate steps to leave the perpetrator and to take the children with her.<sup>4</sup>

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<sup>4</sup> The mother argues that it was inconsistent to remove the children from her custody based, in part, on her supposed failure to protect them from domestic violence by the Wi. father, yet give the Wi. father custody of his child, Ak.

This is a legitimate concern, particularly as the Department did precious little to check on Ak.’s welfare after she was placed with the Wi. father. The placement was made on December 7, 2012. However, the social worker was not able to reach the Wi. father by phone until January 17, 2013. Just five days later, on January 22, 2013, the juvenile court gave the Wi. father sole physical custody of Ak.

Nevertheless, the juvenile court could rationally conclude that the mother and the Wi. father were not similarly situated, for two reasons. First, the Wi. father (at least according to his own report) had completed a court-ordered domestic violence program; the mother had never received any domestic violence training or counseling. Second, the

*[footnote continued on next page]*

The Department asserts that there was yet another incident in 1997. Admittedly, at one point, the social worker referred to an incident “in 1997,” in which the perpetrator was the Wi. father and in which the mother went to a shelter but then left. Obviously, that date is a typo, and this refers to the single incident of domestic violence involving the Wi. father in 2005. In 1997, the mother was approximately 16, and she had not even met the Wi. father yet.

As the Department notes, in 2007, Al. reported that “her step[-]father strikes her mother . . . .” However, the report was investigated and found to be “[i]nconclusive.” Thus, it is not substantial evidence.

We therefore conclude that there was insufficient evidence to support the juvenile court’s finding of failure to protect based on domestic violence.

2. *Jurisdiction based on the P. father’s alcohol abuse.*

The second and third allegations involved alcohol abuse by the P. father.

“[W]ithout more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found. [Citations.]” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764-765.) In *Drake M.*, the father used marijuana, an illegal drug, up to

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*[footnote continued from previous page]*

Wi. father (again, according to his own report) had not been involved in any subsequent incidents of domestic violence, whereas the mother had been victimized again by the P. father.

We part company with the juvenile court because we conclude that the only facts that distinguished the mother — i.e., her lack of domestic violence training and her second victimization — fell short of showing any failure to protect the children.

four or five times a week. (*Id.* at p. 764.) A fortiori, a parent’s use of alcohol, which is legal, is insufficient to support jurisdiction, standing alone. This is particularly true when someone other than the alcohol-using parent is primarily responsible for the care of the child. (*In re James R.* (2009) 176 Cal.App.4th 129, 137.)

Here, there was no evidence that the P. father ever cared for the children.<sup>5</sup> In lieu of child support, he let them live in his house. However, he spent most of his time inside his bedroom. The mother explained that, when she had to go to the store, she either took the children with her or left them in the care of a neighbor. Admittedly, there was some evidence that the P. father occasionally ran errands for the children, such as buying Play-Doh. The mother also told a social worker that “on a few occasions Mr. P[.] has bought the children pizza and McDonald’s food but not often.” Buying Play-Doh or pizza while drunk, however, did not pose any risk of serious physical harm or illness *to the children*.

There was also evidence that the P. father had been convicted of drunk driving. Again, however, there was no evidence that he ever drove with the children while drunk. If we could affirm based on this evidence, every parent with even a single drunk-driving conviction would face having his or her children declared dependents. Dependency law does not cut this wide a swath. (Cf. *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1004 [“logical consequence” of basing jurisdiction on risk from secondhand marijuana smoke

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<sup>5</sup> At oral argument, counsel for the Department conceded that he “abdicated completely” from any responsibilities for the children.

“would be to remove minor children from the homes of all smokers . . . regardless of what they smoke. We know of no legal support for this proposition.”].)

We therefore conclude that there was insufficient evidence to support the juvenile court’s finding of failure to protect based on the P. father’s alcohol abuse.

B. *Jurisdiction over the Youngest Girl.*

With regard to the youngest girl (At.), the juvenile court sustained the following allegations:

1. Failure to protect, in that

a. “[The We. father] has a criminal history . . . .”

b. “The [We.] father is not a member of the household, and has failed to provide the child with adequate food, clothing, shelter, medical treatment and/or protection.”

c. “The [We.] father abuses controlled substances, including, but not limited to methamphetamine.”

2. Failure to support, in that “[t]he [We.] father . . . is currently incarcerated, his release date is unknown, and he is unable to provide care or support to his child.”

3. Abuse of a sibling, in that “[t]he child’s half-siblings . . . have been abused and/or neglected as defined in subdivision (b) of the Welfare and Institutions Code [*sic*]; therefore, this child is at substantial risk of suffering similar harm.”



1. *Jurisdiction based on the We. father's acts and omissions.*

Other than abuse of a sibling, all of the allegations were based on acts or omissions of the We. father. However, there was no evidence that these placed the youngest child at risk in any way. The We. father had never lived with the mother; he had never had custody of the child. At the time of the jurisdictional/dispositional hearing, he was incarcerated. And, as discussed above, there was no evidence that the child was at risk from being left with the mother. Indeed, at disposition, the juvenile court did not remove her from the mother's custody. Thus, there was no evidence that the We. father's acts or omissions created a substantial risk of serious physical harm to the child, as Welfare and Institutions Code section 300, subdivision (b) would require. Likewise, there was no evidence that they left the child "without any provision for support," as Welfare and Institutions Code section 300, subdivision (g) would require. (See *In re Anthony G.* (2011) 194 Cal.App.4th 1060, 1065 ["Mother and Grandmother provided . . . support. That [the father] failed to contribute to that support does not justify jurisdiction under section 300, subdivision (g)."].)

2. *Jurisdiction based on abuse of a sibling.*

Jurisdiction based on abuse of a sibling requires two things. First, it requires that "[t]he child's sibling has been abused or neglected, as defined in [Welfare and Institutions Code section 300,] subdivision (a), (b), (d), (e), or (i) . . . ." (Welf. & Inst. Code, § 300, subd. (j).) Second, it also requires "a substantial risk that the child will be abused or neglected, as defined in those subdivisions." (*Ibid.*)

Here, because there was insufficient evidence to support jurisdiction over the four older children, by definition, there was insufficient evidence to satisfy the first prong of this test. For the same reason, and because there was no evidence of any independent risk of abuse or neglect of At. herself, the second prong of the test also was not satisfied.

### III

#### DISPOSITION

The jurisdictional orders are reversed. Accordingly, the dispositional orders must also be reversed. (See *In re Maria R.* (2010) 185 Cal.App.4th 48, 71, disapproved on other grounds in *In re I.J., supra*, 56 Cal.4th at pp. 780-781.) Unless the Department files a timely amended petition alleging that new circumstances would justify a new finding of jurisdiction, the juvenile court must promptly dismiss the petitions. (See *In re V.M.* (2010) 191 Cal.App.4th 245, 254.)

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RICHLI  
Acting P. J.

We concur:

KING  
J.

MILLER  
J.